IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0603

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM A. PARRISH,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Sixteenth Judicial District Court,
Rosebud County, The Honorable Joe L. Hegel, Presiding

APPEARANCES:

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2. It was an abuse of discretion for the district court to deny Parrish's motion for a new trial.

3. The failure to include negligent endangerment as a lesser-included offense should be reviewed under the plain error doctrine.

4. In the alternative, defense counsel was ineffective for failing to propose an instruction for negligent endangerment.

STATEMENT OF THE CASE

William Ashley Parrish ("Parrish") was charged by Information filed in Cause No. DC-2008-27 on August 12, 2008, in Rosebud County District Court with Count I: Aggravated Assault, a felony, in violation of Mont. Code Ann. § 45-5-202. An Amended Information was filed on September 8, 2008, charging Parrish with Count II: Criminal Endangerment, a felony, in violation of Mont. Code Ann. § 45-5-207.

A jury trial was held April 13-17, 2009. The jury returned a verdict of not guilty on the Aggravated Assault and a verdict of guilty on the charge of Criminal Endangerment.

A sentencing hearing was conducted by the district court on August 31, 2009, and the district court issued its Sentencing Order on September 3, 2009. Parrish filed a timely notice of appeal on November 9, 2009, and now appeals his conviction for Criminal Endangerment and the denial of his motion for new trial.

STATEMENT OF THE FACTS

On the afternoon of June 16, 2008, Parrish was watching the two younger children of his girlfriend, B.H., while she was out collecting agates. Parrish was holding M.G., then 13 months old, while trying to get some things out of the refrigerator. M.G. arched his back and Parrish lost his grip on M.G. As M.G. was falling, Parrish reached out and grabbed his arm. As he grabbed M.G.'s arm, Parrish heard a pop. (April 13, 2009 Hearing Transcript (4/13/09 Tr.) at 701.)

Parrish immediately took M.G. to the hospital, where it was discovered that his arm was broken. (4/13/09 Tr. at 703.) While waiting at the hospital, Child and Family Services Regional Supervisor Grant Larson ("Larson"), and a deputy sheriff, interviewed Parrish regarding the events leading to M.G.'s broken arm. Parrish felt that Larson did not find his story regarding the broken arm credible. (4/13/09 Tr. at 704-05.) Larson requested to go back to Parrish's house in order to see where the accident occurred, where he spoke with Parrish and B.H. Both Parrish and B.H. testified that Larson seemed suspicious of the story and left them with the impression that there would be an ongoing investigation to determine if

the children should be removed from their care. (4/13/09 Tr. at 226-27, 708.) Parrish and B.H. felt on edge for the following months and were worried that CFS would come back and remove the children. (4/13/09 Tr. at 227, 709.)

No charges were filed against Parrish as a result of the broken arm. (4/13/09 Tr. at 826.)

On August 5, 2008, Parrish was again watching the children while B.H. was running errands. (4/13/09 Tr. at 712.) Shortly before 11:00 am, Parrish picked up M.G. to put him in his crib to nap. As Parrish was stepping over the baby gate to the children's room, his sock caught on the baby gate and his other foot slipped out from under him. Parrish and M.G. fell to the linoleum floor. (4/13/09 Tr. at 722.) Parrish immediately noticed that M.G. was not breathing and that his eyes were rolled back in his head. (4/13/09 Tr. at 722.)

Parrish started CPR on M.G., although he had no formal training in adult or infant CPR. After ten chest compressions and two breaths, M.G. began breathing again. (4/13/09 Tr. at 722-24.) M.G. was not crying, but softly whimpering. Within minutes of M.G. regaining his breath, B.H. came home. (4/13/09 Tr. at 726.) Parrish did not tell B.H. about the accident. (4/13/09 Tr. at 733.)

Parrish had to be at work at noon. Prior to going to work, Parrish checked on M.G. and discovered that there was a large knot on the back of M.G.'s head. He immediately showed it to B.H. and suggested that perhaps the bruise was the

result of M.G.'s older sister hitting him on the head with a toy. B.H. told Parrish that she would keep an eye on it and see if M.G. needed to go to the doctor. (4/13/09 Tr. at 732-33.) Although he was concerned about M.G., Parrish had a high level of confidence in B.H.'s ability as a mother and that she would seek medical care for M.G. if needed. (4/13/09 Tr. at 736.)

Parrish went to work and did not hear anything until B.H. called him from the emergency room at roughly 5:00 pm that same day. (4/13/09 Tr. at 734.) Parrish went to the emergency room where he learned that M.G. had a skull fracture. (4/13/09 Tr. at 737.) M.G. was transferred to Billings, where it would later be discovered that he had a bruised liver and a small tear to his pancreas. (4/13/09 Tr. at 315-16.) From Billings, M.G. was transported to The Children's Hospital in Aurora, Colorado. (4/13/09 Tr. at 326.) M.G. spent fifteen days at The Children's Hospital where he was monitored. No intervention or treatment was necessary to stabilize M.G. (4/13/09 Tr. at 902.) All of M.G.'s injuries resolved themselves without further medical intervention. (4/13/09 Tr. at 905-06.)

At the trial, Larson testified to his contact with Parrish and B.H. on June 16, 2008. Larson testified that he contacted B.H. on June 17, 2008, and informed her that the investigation regarding M.G.'s broken arm was closed. (4/13/09 Tr. at 599.) Both B.H. and Parrish testified that they had no recollection of this phone

call and still believed that CFS was investigating the injury when M.G. was taken to the hospital on August 5, 2008. (4/13/09 Tr. at 708-09, 936.)

In its cross-examination of B.H., the State introduced five releases signed by B.H. on June 17, 2008, at the request of CFS. (4/13/09 Tr. at 970.) At closing, the State argued that the releases signed by B.H. were inconsistent with her testimony that she had not received a phone call from Larson or further information from CFS regarding the status of the investigation of M.G.'s broken arm. (4/13/09 Tr. at 1039.)

Parrish's counsel argued that based upon his previous contact with CFS with M.G.'s broken arm, Parrish was afraid to take M.G. to the hospital. His failure to do so was careless and irresponsible, but did not rise to the level of knowingly creating a risk. (4/13/09 Tr. at 1075.) Counsel further argued that the only external sign of injury was the bruise on M.G.'s head and there was no way for Parrish to be aware of the internal injuries. (4/13/09 Tr. at 1072.)

When settling jury instructions, Parrish's counsel did not offer an instruction on negligent endangerment. (4/13/09 Tr. at 1009-22.)

The jury returned a verdict of not guilty as to Count I: Aggravated Assault and guilty as to Count II: Negligent Endangerment.

Parrish filed a motion for a new trial, based upon the introduction of the five releases signed by B.H. (D.C. Doc. 140.) The releases were not produced by the

State in response to Parrish's discovery requests. The district court denied the motion. (D.C. Doc. 147.)

Parrish was sentenced to the Montana State Prison for a term of eight years, with four suspended. (D.C. Doc. 152).

STANDARD OF REVIEW

A district court's determination that the State did not violate *Brady* is reviewed *de novo*. *See e.g.*, *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009).

The standard of review of a district court's ruling on a motion for new trial is whether the district court abused its discretion. *State v. Clark*, 2005 MT 330, ¶ 18, 330 Mont. 8, 125 P.3d 1099. *State v. McCarthy*, 2004 MT 312, ¶ 43, 324 Mont. 1, 101 P.3d 288.

> This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made . . . where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process . . . .

Clark, ¶ 17.

SUMMARY OF THE ARGUMENT

This Court should dismiss this case or reverse and remand for a new trial on the following basis. The State's failure to comply with *Brady* violated Parrish's right to present a complete defense and deprived him of his due process rights. Similarly, the district court's failure to grant him a new trial based upon the *Brady* violation was an abuse of discretion. Finally, the failure to include an instruction on the lesser-included offense of negligent endangerment compromised the integrity of the judicial process and violated Parrish's right to have the jury fully and fairly instructed.

ARGUMENT

I. THE STATE'S FAILURE TO PRODUCE EVIDENCE MATERIAL TO PARRISH'S DEFENSE CONSTITUTES A VIOLATION OF *BRADY v. MARYLAND*.

Under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 17 of the Montana Constitution, criminal prosecutions must comport with prevailing notions of fundamental fairness. This Court has interpreted this standard of fairness to require criminal defendants be afforded a meaningful opportunity to present a complete defense. In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that this fundamental fairness and due process requires the prosecution upon request to

provide the defense any evidence favorable to the accused which is material either to guilt or punishment.

In order to establish a *Brady* violation in Montana, a defendant must show the following:

> (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the petitioner did not possess the evidence nor could he have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different.

State v. Johnson, 2005 MT 318, ¶ 12, 329 Mont. 497, 125 P.3d 1096 (citation omitted).

An intentional suppression of evidence is not necessary to give rise to a *Brady* violation. Even the State's negligent failure to preserve or produce possible exculpatory evidence is sufficient to constitute a deprivation of a defendant's due process right to gather such evidence if the evidence is material and of substantial use, vital to the defense, and exculpatory. When the State's negligence precludes a fair trial, dismissal of the case with prejudice is the appropriate remedy. *State v. Swanson*, 222 Mont. 357, 362, 722 P.2d 1155, 1158 (1986).

Here, all elements of a *Brady* violation can be satisfied. It is undisputed that the State possessed the releases signed by B.H. and that these releases could have been used by Parrish to impeach Larson regarding the role that CFS continued to play in the lives of Parrish and B.H. These releases were favorable to the defense

in that they could have impeached a State witness and provided further evidence of Parrish's state of mind and an explanation of his behavior after M.G.'s fall.

Counsel for Parrish requested the CFS file in October 2008, specifically requesting information regarding Parrish, M.G., B.H. and records regarding M.G.'s broken arm. (D.C. Doc. 65.) The documents were produced to Parrish and his counsel seven months after the request and six days prior to the commencement of the trial. The releases were not included in the documents produced. Parrish did not have access to the releases until the last day of the trial and had previously exercised reasonable diligence in obtaining discovery from the State.

Finally, had the releases been produced prior to the last day of trial, there is a reasonable probability that Parrish would not have been convicted of criminal endangerment. There was conflicting testimony between Parrish, B.H. and Larson about the continued role that CFS played after M.G.'s broken arm. Both Parrish and B.H. testified that they lived on edge, believing CFS was still considering removal of the children. Parrish testified this was his primary reason in not immediately taking M.G. to the hospital after his fall. Larson testified that he informed Parrish and B.H. that the investigation was closed on June 17, 2008. Both B.H. and Parrish contradicted this testimony. The ability to confront Larson on the purpose of the releases, if truly the investigation was closed, and bolster Parrish's defense, was lost.

Given that the crux of Parrish's defense to the charge of criminal endangerment was his fear of removal of the children given the proximity in time to M.G.'s broken arm and the lack of closure received from CFS regarding its investigation regarding the broken arm, there is a reasonable probability that the releases and ability to cross-examine Larson on the releases could have resulted in a different outcome. Because Parrish can satisfy each prong of the *Brady* test, this Court should determine that the State violated *Brady* and the matter should be dismissed with prejudice, or in the alternative remanded to the district court for a new trial.

II. IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY PARRISH'S MOTION FOR A NEW TRIAL.

On May 5, 2009, Parrish moved the district court for a new trial, pursuant to Mont. Code Ann. § 46-16-702. (D.C. Doc. 140.) Section 46-16-702 provides that the district court may grant a defendant a new trial if required in the interest of justice. Parrish argued that the State's failure to disclose the releases signed by B.H. on June 17, 2008, warranted a new trial.

This Court has held that in order to prevail on a motion for a new trial grounded on newly discovered evidence, the movant must satisfy a five part test.

> 1) The evidence must have been discovered since the defendant's trial;
> 2) The failure to discover the evidence sooner must not be result of a lack of diligence on the defendant's part;
> 3) The evidence must be material to the issues at trial;

4) The evidence must be neither cumulative nor merely impeaching; and
5) The evidence must indicate that a new trial has a reasonable possibility of resulting in a different outcome.

Clark, ¶ 34.

Parts (1) and (2) can be relatively easily established. There is no dispute that Parrish and his counsel did not see the releases until they were provided by the State on the last day of trial. Additionally, Parrish exercised due diligence in requesting any information contained in the CFS record, and specifically, any information regarding M.G.'s broken arm. This information was requested on October 8, 2008, in his Motion for Discovery. (D.C. Do. 65.) The CFS file was ultimately provided to Parrish, after an *in camera* review by the district court, on April 7, 2008 (six days prior to the start of the trial). However, the releases were not produced in response to Parrish's discovery requests made to the State.

Parrish argues that the releases were relevant to the issues at trial, and although could have been used for impeachment, had the potential to bolster his defense that he was fearful that he was still under close scrutiny from CFS due to M.G.'s broken arm and, it was under that state of fear of CFS, that he delayed in seeking medical treatment for M.G. The releases went beyond impeachment and strengthened the credibility of Parrish and B.H.

Finally, the releases were relevant to Parrish's mental state at the time of M.G.'s fall. Parrish was under the impression that he and B.H. were still being

investigated for M.G.'s broken arm. Parrish was acting under this impression when he failed to seek medical care for M.G. Parrish's mental state is directly related to the charge of criminal endangerment.

The final step required the district court to look prospectively at what a jury might have done with such new information. Here, the district court determined that the releases were "cumulative impeachment evidence" and did not analyze the final step. (D.C. Doc. 147.) An analysis of what a jury might have done had Parrish had access to the releases requires the district court to determine the weight and credibility of the new evidence and consider what impact this evidence could have on the jury. *Clark*, ¶ 36.

Parrish's conviction for criminal endangerment means the jury found he possessed the requisite mental state of "knowingly." The releases were substantive evidence which could have been used to undermine the State's ability to prove "knowingly." Absent the State's ability to prove each element of criminal endangerment beyond a reasonable doubt, there can be no conviction. The releases were material to Parrish's defense and exculpatory to the State's position that he acted knowingly. There is a reasonable probability that a new trial could result in a different outcome.

Parrish can satisfy the required five part test as set forth in *Clark*. The district court abused its discretion in denying his motion for a new trial. This matter should be remanded to the district court for a new trial.

III. THE FAILURE TO INCLUDE NEGLIGENT ENDANGERMENT AS A LESSER-INCLUDED OFFENSE SHOULD BE REVIEWED UNDER THE PLAIN ERROR DOCTRINE.

Plain error review allows this Court to discretionarily review claimed errors that implicate fundamental constitutional rights, even if no contemporaneous objection is made. Plain error review should be applied when failing to review the claimed error "may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Stewart*, 2000 MT 379, ¶ 33, 303 Mont. 507, 16 P.3d 391 (citing *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996)). This Court may apply this review pursuant to the Court's "inherent power and paramount obligation to interpret Montana's Constitution and to protect the rights set forth in that document." *Finley*, 276 Mont. at 137, 915 P.2d at 215.

Montana Code Annotated § 46-1-202(9) defines an included offense as one that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged." The facts required to prove criminal endangerment, pursuant to Mont. Code Ann. § 45-5-207, and negligent

endangerment, pursuant to Mont. Code Ann. § 45-5-208, are identical with the exception of the mental state of the defendant. Criminal endangerment requires knowingly engaging in a conduct that creates a substantial risk of death or serious bodily injury, while negligent endangerment requires negligently engaging in that same conduct. There is no required mental state for the State to prove under negligent endangerment, thus negligent endangerment can be established by proof less than that necessary to prove criminal endangerment.

It is a well established rule that a defendant is entitled to jury instructions that "cover every issue or theory having support in evidence." Further, a defendant is entitled to an instruction on a lesser-included offense if any evidence exists upon which the jury could rely to find him guilty of a lesser offense. The purpose being to prevent juries from convicting defendants on charges merely because the only alternative was acquittal. Given the paramount importance that jury instructions, as a whole, fairly and fully instruct the jury on the law applicable to the case, it is appropriate to review the failure to include a lesser-included offense under the plain error review. *State v. Castle*, 285 Mont. 363, 367, 948 P.2d 688, 690 (1997).

Here, there was sufficient evidence in the record to allow the jury to consider whether Parrish's failure to immediately take M.G. to the hospital knowingly or negligently endangered M.G. There was testimony that the only outward appearance of the injuries to M.G. was the knot on the back of his head

and the only signs that M.G. was experiencing a level of pain or discomfort was his soft whimpering. Parrish had no way of knowing that his attempts at CPR had caused internal injuries to M.G. Further, Parrish testified that his fear of CFS and Larson contributed to his failure to seek medical care. This lack of knowledge opens the possibility that his failure to take M.G. to the hospital was negligent.

The failure to have negligent endangerment as a lesser-included offense for the jury to consider compromised the integrity of the jury's deliberation and calls into question the fundamental fairness of the instructions. Under these circumstances, this Court should determine that it was plain error to fail to include the instruction for negligent endangerment and the matter should be reversed and remanded to the district court for a new trial.

IV. IN THE ALTERNATIVE, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE AN INSTRUCTION FOR NEGLIGENT ENDANGERMENT.

In order to succeed on an ineffective assistance of counsel claim, a criminal defendant must establish: 1) counsel's performance fell below an objective standard of reasonableness; and 2) a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Prior to reaching the merits of an ineffective assistance claim, the Court must first determine whether the allegations are properly before the Court on

appeal or should be raised in a petition for postconviction relief. Generally, "where ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal; conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for postconviction relief." *State v. Upshaw*, 2006 MT 341, ¶ 33, 335 Mont. 162, 153 P.3d 579.

Here, no record exists to determine why counsel failed to submit a jury instruction for negligent endangerment, which would typically result in this issue being raised in a petition for postconviction relief. However, no plausible justification exists to counter the claim for ineffective assistance of counsel. In those circumstances, direct appeal is the appropriate means to raise this issue. *Upshaw*, ¶ 34 (citing *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095).

Parrish acknowledged he failed to seek medical care for M.G. In closing, his counsel argued that his failure to seek medical care was "reckless" and "irresponsible." Because of these admissions and statements, there can be no plausible justification for not requesting the instruction on negligent endangerment.

The failure of defense counsel to propose an instruction for a lesser-included offense falls below an objective standard of reasonableness. Parrish was entitled to

an instruction on negligent endangerment as it was supported by facts in the record, as set forth more fully in Section III. Additionally, Parrish did not deny that he failed to seek medical care for M.G. Parrish testified that he was fearful of continued CFS involvement and the removal of the children if he sought medical care. There was testimony that the only external signs of injury to M.G. was the bruise on his head and that the internal injuries resolved themselves without medical intervention. The record reflects evidence which would have supported an instruction on negligent endangerment.

Because of the testimony elicited from Parrish and other witnesses, it is not an unreasonable probability that the jury could have found negligent endangerment a more appropriate verdict. There was ample evidence and testimony that Parrish's failure to seek medical care was based upon negligence. Yet, Parrish does not need to prove the outcome would be different, merely that a reasonable probability exists that the outcome would be different.

As a result of the omission of defense counsel to request an instruction on negligent endangerment, Parrish is entitled to a new trial.

CONCLUSION

Parrish's conviction for criminal endangerment should be reversed and the charge dismissed due to the State's violation of *Brady*. Alternatively, this Court should reverse the conviction and remand to the district court. The failure of the

district court to grant a new trial based upon the failure of the State to produce the releases in a timely manner was an abuse of discretion. There is sufficient evidence to indicate that the timely release of such evidence could result in a different outcome.

The failure of counsel to request an instruction on criminal endangerment was a critical error. Parrish's conviction should be reversed and remanded to the district court for a new trial on the charge of criminal endangerment, at which time the jury should be properly instructed on negligent endangerment.

Respectfully submitted this _____ day of March, 2010.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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ELIZABETH THOMAS

APPENDIX